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Recommended Citation

Brandon R. Keel, *Profiting under the Veil of Compensation: Wills v. Foster and the Application of the Collateral Source Rule to Medicare and Medicaid*, 58 DePaul L. Rev. 789 (2009)
Available at: <https://via.library.depaul.edu/law-review/vol58/iss3/10>

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PROFITING UNDER THE VEIL OF COMPENSATION: WILLS V. FOSTER AND THE APPLICATION OF THE COLLATERAL SOURCE RULE TO MEDICARE AND MEDICAID

INTRODUCTION

At first glance, compensation appears to be a relatively simple concept. In fact, Merriam-Webster's dictionary defines compensation simply as the act of "making up, making good, or counterbalancing."¹ In many aspects of law, however, the concept of compensation is anything but simple. For example, consider a hypothetical in which a negligent driver injures someone. If the injured person required surgery that cost \$100,000, how much money would be necessary to compensate that party for her loss? In all likelihood, it would take exactly \$100,000 to compensate her for her medical expenses. However, if the injured party was short on cash and her friend paid that \$100,000 on her behalf, how much money would she then seek in damages? In that situation, one would assume that the injured party would need to repay her friend, so \$100,000 would remain the appropriate measure of compensation. Now consider a more complex situation in which the injured party's friend was a professional negotiator who convinced the hospital to accept \$50,000 as full payment for the surgery. If the injured party then brought a personal injury suit against the negligent driver, would the plaintiff's attorney advise her to seek \$100,000, \$50,000, or \$0 in compensatory damages?

This question presents some of the complicated issues associated with the law of compensation. While the injured party technically paid nothing out of her own pocket, her friend paid \$50,000, and the hospital received \$50,000 less than what the surgery cost. So who should receive compensation in this situation, and how much should they receive?

The answer to this question directly relates to personal injury suits involving plaintiffs whose medical expenses have been covered by Medicare or Medicaid. In such cases, questions of compensation are important because Medicare and Medicaid generally reimburse healthcare providers with a significantly lower amount than that which

1. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 453 (Philip Babcock Gove ed., 1981).

those providers charge for their services.² Like the hypothetical friend-negotiator, Medicare and Medicaid provide hospitals with a payment that is less than the amount hospitals charge. This payment is treated as payment in full, which prevents the hospital from recovering additional amounts from the injured party herself. Nonetheless, such injured parties have generally been able to bring suits against negligent third parties and recover the full amount charged by the healthcare providers.

The Illinois appellate court in *Wills v. Foster*, however, limited such recoveries.³ The court's decision addressed a question that is relevant to the compensation issues dealt with in this introduction—whether the collateral source rule applies to Medicare and Medicaid benefits.⁴ The collateral source rule is a rule of damages that prevents a tortfeasor from submitting evidence to show that a plaintiff's expenses were paid by an independent third party.⁵ Typically, the rule allows a plaintiff to recover the full amount of expenses related to her injury even though the plaintiff's insurer paid those expenses or a lesser amount.⁶ In *Wills*, the appellate court held that the collateral source rule does not apply to benefits paid by Medicare and Medicaid and, therefore, plaintiffs covered by these programs are limited to recovering the amount actually paid to the healthcare provider.⁷ The Illinois Supreme Court then reversed the decision and held that the collateral source rule applies to Medicare and Medicaid benefits; thus, under this approach, payments from these programs—or the amounts written off by the providers—do not reduce the plaintiff's recovery.⁸

This Note analyzes the *Wills* case, describes its impact on damages in Illinois, and explains why the Illinois Supreme Court erred in overturning the appellate decision. Part II of this Note provides background information on the law of damages, the development of the collateral source rule, governmental healthcare, and subrogation rights, and then examines different jurisdictional approaches to this issue.⁹ Part III examines the *Wills* case and provides a brief summary of *Arthur v. Catour*, a previous Illinois Supreme Court decision inter-

2. TERRY S. COLEMAN, LEGAL ASPECTS OF MEDICARE & MEDICAID REIMBURSEMENT: PAYMENT FOR HOSPITAL AND PHYSICIAN SERVICES 21, 81 (Nat'l Health Lawyers Ass'n 1990).

3. 867 N.E.2d 1223, 1228 (Ill. App. Ct. 2007), *rev'd* 892 N.E.2d 1018 (Ill. 2008).

4. *Id.*

5. RESTATEMENT (SECOND) OF TORTS § 920A (1979).

6. *Id.* cmt. c.

7. *Wills*, 867 N.E.2d at 1228.

8. *Wills v. Foster*, 892 N.E.2d 1018, 1033–34 (Ill. 2008).

9. See *infra* notes 13–111 and accompanying text.

preting the collateral source rule.¹⁰ Part IV discusses the implications of the appellate and supreme court opinions in *Wills* and argues that the Illinois Supreme Court erred in overturning the appellate decision.¹¹ Finally, Part V contemplates the impact that the Illinois Supreme Court's ruling will have on personal injury cases in Illinois.¹²

II. BACKGROUND: DAMAGES, COLLATERAL SOURCES, MEDICARE, AND MEDICAID

This Part provides an overview of the legal aspects of damages, collateral sources, and governmental healthcare. Section A presents general rules of damages for tort cases.¹³ Section B details the development and application of the collateral source rule.¹⁴ Section C reviews the application of the collateral source rule in Illinois.¹⁵ Section D discusses Medicare and Medicaid,¹⁶ and Section E discusses subrogation.¹⁷ Finally, Section F examines the different jurisdictional approaches applying the collateral source rule to Medicare and Medicaid.¹⁸

A. *Damages in Torts*

The issue of damages is a question of fact,¹⁹ and in tort law, there is no exhaustive list of rules defining recoverability.²⁰ The law does not specify every item to be recovered in any given case; rather, it attempts to put the injured party in the position in which she would have been had the injury not occurred.²¹ Generally, courts allow a plaintiff to recover "all damages that are the natural and proximate result or consequence of a tort."²² Four basic purposes govern the measure of damages in such cases: (1) compensation of the injured

10. See *infra* notes 112–172 and accompanying text.

11. See *infra* notes 173–238 and accompanying text.

12. See *infra* notes 239–250 and accompanying text.

13. See *infra* notes 19–32 and accompanying text.

14. See *infra* notes 33–43 and accompanying text.

15. See *infra* notes 44–53 and accompanying text.

16. See *infra* notes 54–68 and accompanying text.

17. See *infra* notes 69–84 and accompanying text.

18. See *infra* notes 85–111 and accompanying text.

19. *Flynn v. Vancil*, 242 N.E.2d 237, 240 (Ill. 1968).

20. *Pittsburg, C., C. & St. L. Ry. v. Story*, 63 Ill. App. 239, 239–40 (Ill. App. Ct. 1896); MARC A. FRANKLIN, *INJURIES AND REMEDIES: CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 416 (1971).

21. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

22. MATTHEW BENDER, *DAMAGES IN TORT ACTIONS* § 1.01[3] (2008).

party; (2) determination of the parties' rights; (3) punishment of wrongdoers; and (4) deterrence of self-help.²³

As the name suggests, compensatory damages are awarded to compensate or indemnify the plaintiff for the harm she sustained.²⁴ However, the law clearly provides that an award based on compensatory damages should not provide the injured party with a profit from the transaction; the amount awarded should be limited to that which is required to compensate the party.²⁵ A plaintiff's medical expenses are an important aspect of compensatory damages. Courts consistently recognize that reasonable and necessary medical expenses are recoverable as special compensatory damages.²⁶ However, in order to recover such expenses, "the plaintiff must prove that he or she has paid or become liable to pay a medical bill, that he or she necessarily incurred the medical expenses because of injuries resulting from the defendant's negligence, and that the charges were reasonable for services of that nature."²⁷

Expert testimony is the most common method of proving the necessity of medical expenses.²⁸ However, the law is less clear as to what a plaintiff must show to establish the reasonableness of those expenses.²⁹ Under the majority view, amounts paid or charged for medical expenses alone do not establish the reasonableness of such expenses.³⁰ Under the minority view, the amount of the plaintiff's medical bill is per se reasonable.³¹ In Illinois, courts have adopted a middle-ground approach by finding that a medical bill for treatment rendered in response to a personal injury constitutes prima facie evi-

23. *Id.* § 1.01[2] (citing RESTATEMENT (SECOND) OF TORTS § 904 (1979)).

24. RESTATEMENT (SECOND) OF TORTS § 903 (1979).

25. 25 C.J.S. *Damages* § 21 (2002). There are two types of compensatory damages: general damages and special damages. RESTATEMENT (SECOND) OF TORTS § 904 (1979). General damages are those that are so frequently associated with the alleged tort that the plaintiff does not have to prove the damages in order to recover. *Id.* In other words, when a tort is alleged, there are certain damages that the court assumes exist. *Id.* cmt. a. Special damages encompass all compensatory damages other than those considered general damages. *Id.* § 904[2].

26. BENDER, *supra* note 22, § 9.01.

27. *Arthur v. Catour*, 833 N.E.2d 847, 853 (Ill. 2005).

28. BENDER, *supra* note 22, § 9.02.

29. *Id.* § 9.03[2][a] (describing the conflicting jurisdictional rules relating to whether the amount paid or charged constitutes the reasonable value of services rendered).

30. *Id.* (showing that Alaska, Iowa, Maryland, North Carolina, and Texas represent the majority view rejecting medical bills alone as sufficient evidence to establish reasonableness).

31. *Id.* (showing that Connecticut, Idaho, Kentucky, Louisiana, North Dakota, and Ohio follow this approach).

dence of the reasonableness of those charges, but only if the bill is paid.³²

B. Collateral Payments and the Collateral Source Rule

The collateral source rule is often traced back to an 1854 United States Supreme Court case, *Propeller Monticello v. Mollison*.³³ Under the collateral source rule, “benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable.”³⁴ Payments made to benefits or benefits conferred on a plaintiff by parties other than the defendant—or by a party acting on behalf of the defendant—are known as payments from collateral sources.³⁵ Although such payments may reduce the plaintiff’s pecuniary losses, the collateral source rule prevents any such reduction from affecting the defendant’s liability.³⁶ Thus, this rule allows a plaintiff to receive a compensatory reward for medical expenses that exceeds the amount that she actually incurred.³⁷

The intended purpose of the collateral source rule is to “protect[] collateral payments made to or benefits conferred on the plaintiff by denying the defendant any corresponding offset or credit.”³⁸ The rule acts as both a rule of damages and a rule of evidence by preventing the reduction of the plaintiff’s recovery and precluding the defendant from submitting evidence of collateral benefits.³⁹ One of the most frequent applications of the rule occurs when an injured party is partly

32. *Arthur*, 833 N.E.2d at 854 (justifying its holding of prima facie reasonableness by noting that “[t]he premise is that a consumer will not willingly pay an unreasonable or unusual charge for a service”).

33. 58 U.S. 152 (1854); see Douglas Hill Schwartz, Comment, *The Tortured Path of Ohio’s Collateral Source Rule*, 65 U. CIN. L. REV. 643, 643 (1997); Guillermo Gabriel Zorogastua, Comment, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs*, 55 U. KAN. L. REV. 463, 475–76 (2007).

34. *Wilson v. Hoffman Group*, 546 N.E.2d 524, 530 (Ill. 1989).

35. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979).

36. *Id.* cmt. t. The comment explains:

The injured party’s net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff’s injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor.

Id.; see also *Arthur*, 833 N.E.2d at 851 (“Such collateral benefits do not reduce the defendant’s tort liability, even though they reduce the plaintiff’s loss.”).

37. See RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979); see also Zorogastua, *supra* note 33, at 469–70.

38. *Arthur*, 833 N.E.2d at 851.

39. *Id.* at 852.

indemnified or covered for medical expenses pursuant to accident insurance.⁴⁰ Although application of the rule may result in overcompensation for the plaintiff—a result that is inconsistent with a strong public policy in Illinois—the rule acts as an exception to the general prohibition against excessive recoveries.⁴¹ Some courts justify this exception by noting that insurance companies generally have a subrogation right against the plaintiff's award, which will prevent the plaintiff from being overcompensated.⁴² Other courts and authorities, however, simply take the position that it is better to side with the injured party and allow the plaintiff to receive a windfall than to reduce the defendant's liability.⁴³

C. *Development of the Collateral Source Rule in Illinois*

The collateral source rule first appeared in Illinois in 1870, when the Illinois Supreme Court decided the case of *Pittsburg, Cincinnati & St. Louis Railway Co. v. Thompson*.⁴⁴ The plaintiff in *Thompson* was partially indemnified by his insurance carrier, but the court rejected the defendant's argument that the plaintiff's reward should be reduced by the insurance payments.⁴⁵ The court held that if such amount was paid by the plaintiff's insurer, it did not *pro tanto* discharge the defendant from liability for those expenses.⁴⁶ Since the advent of the collateral source rule, courts have consistently applied it to personal injury cases in which the plaintiff's medical expenses were paid by her personal insurance carrier.⁴⁷ The collateral source rule has also been applied to other causes of action, including those for

40. *Wilson v. Hoffman Group*, 546 N.E.2d 524, 530 (Ill. 1989).

41. *Cress v. Recreation Servs., Inc.*, 795 N.E.2d 817, 860 (Ill. App. Ct. 2003); *Hansen v. Baxter Healthcare Corp.*, 723 N.E.2d 302, 315 (Ill. App. Ct. 2000).

42. *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 67 (Cal. 1970).

43. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979); *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958); *Muranyi v. Turn Verien Frisch-Auf*, 719 N.E.2d 366, 369 (Ill. App. Ct. 1999); *Werner v. Lane*, 393 A.2d 1329, 1335–36 (Me. 1978).

44. 56 Ill. 138 (1870). In *Thompson*, a passenger who was injured as a result of the railroad's negligence brought a personal injury action against the railroad to recover his expenses. *Id.* at 139. In response, the railroad argued that the amount of the passenger's expenses paid by his accident insurance company should be set aside from the passenger's award. *Id.* at 143.

45. *Id.* at 143.

46. *Id.* The *Thompson* court did not refer to the plaintiff's insurance payments as "collateral sources," and it appears that an Illinois court first adopted this term in 1904. See *Ill. Cent. Ry. v. Prickett*, 71 N.E. 435, 436 (Ill. 1904) (holding that it was immaterial whether the decedent's widow and next of kin were paid or entitled to receive money from a life-insurance policy because such benefit only accrued from a "collateral source").

47. See *Arthur v. Catour*, 833 N.E.2d 847, 852 (Ill. 2005); *Wilson v. Hoffman Group*, 546 N.E.2d 524, 530 (Ill. 1989).

wrongful death and dram-shop suits,⁴⁸ but Illinois courts have refused to extend it to cases involving pecuniary losses not associated with personal injuries.⁴⁹

In Illinois, the most common justification for the collateral source rule has been stated as the principle that the tortfeasor “should not benefit from expenditures made by the injured party, or take advantage of contracts or other relations which exist between the injured party and third persons.”⁵⁰ Because of this jurisdiction’s focus on the plaintiff’s expenditures or contracts, Illinois courts have often refused to apply the collateral source rule to situations in which the benefits were conferred on the plaintiff without her having expended money or entered into a contract to secure those benefits.⁵¹ As the Illinois Supreme Court has stated, “the policy behind the collateral source rule simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation.”⁵² Therefore, unlike courts in some jurisdictions, Illinois courts have continued to focus on the plaintiff’s expenditures and actions to justify application of the rule.⁵³

48. Legislatures in many jurisdictions have enacted statutes, commonly known as dram-shop acts, which grant a right of action against parties that are responsible for serving intoxicants to others who injure an innocent third party after consuming the intoxicants. 48A C.J.S. *Intoxicating Liquors* § 636 (2004).

49. *Sterling Radio Stations, Inc. v. Weinstine*, 765 N.E.2d 56, 61–62 (Ill. App. Ct. 2002) (holding that the collateral source rule is inapplicable to legal malpractice cases because it is limited to situations involving personal injuries and does not apply to pecuniary losses for intangible property).

50. *Id.* at 61; *see also* *Lopez v. Morley*, 817 N.E.2d 592, 598 (Ill. App. Ct. 2004); *Wilson*, 546 N.E.2d at 530; *First Midwest Trust Co. v. Rogers*, 701 N.E.2d 1107, 1118 (Ill. App. Ct. 1998).

51. *See Sycamore Preserve Works v. Chi. & Nw. Ry.*, 12 N.E.2d 42, 45–46 (Ill. App. Ct. 1938) (refusing to apply the collateral source rule to prevent a defendant from submitting evidence to show that the plaintiff’s damages were reduced when he salvaged damaged material); *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979) (refusing to apply the collateral source rule to allow plaintiff to recover the value of medical services rendered in response to a personal injury because the services were provided to him at no charge), *overruled by Wills v. Foster*, 892 N.E.2d 1018 (Ill. 2008); *Jones & Adams, Co. v. George*, 81 N.E. 4, 6 (Ill. 1907) (refusing to allow plaintiff to recover the value of nursing services provided to him at no charge by his family). *But see* *Muranyi v. Turn Verien Frisch-Auf*, 719 N.E.2d 366, 370–71 (Ill. App. Ct. 1999) (distinguishing *Peterson* from a situation in which all of the plaintiff’s expenses were paid by her husband’s insurance carrier, applying collateral source rule to such payments, and noting that these benefits are bargained for by the plaintiff, not gratuitous).

52. *Peterson*, 392 N.E.2d at 5.

53. *See* *U.S. Can Co. v. NLRB*, 254 F.3d 626, 631–32 (7th Cir. 2001); *Arthur v. Catour*, 833 N.E.2d 847, 852 (Ill. 2005) (providing an example of Illinois’s emphasis on plaintiff’s expenditures to secure benefits); *see also* *Zorogastua*, *supra* note 33, at 476–77 (discussing the Kansas collateral source rule).

D. Medicare and Medicaid

In *Wills*, the courts' opinions were influenced by the specific type of collateral sources involved, Medicare and Medicaid benefits.⁵⁴ In order to accurately understand and analyze these opinions, one must briefly consider the procedural and administrative processes of these two programs. Although Medicaid programs may vary from state to state, this Section provides a broad overview of the general characteristics of these programs. Medicare and Medicaid are government-funded programs intended to help pay the medical expenses of elderly and low-income individuals who receive care from non-government healthcare providers.⁵⁵ Medicare is funded entirely by the federal government.⁵⁶ In contrast, Medicaid is a federal-state program, under which a state can implement a healthcare program, and if that program complies with certain federal regulations, the federal government will match state expenditures to help cover the beneficiaries' expenses.⁵⁷

Medicare is comprised of four parts, each of which provides a separate form of assistance.⁵⁸ Part A provides assistance for inpatient hospital care, nursing facility services, home healthcare, and hospice services.⁵⁹ Part B provides supplementary medical insurance primarily for outpatient care.⁶⁰ Part C essentially comprises benefits similar to those provided in Part A, B, and D, but it is managed by private insurance companies.⁶¹ Part D is limited to coverage for prescription drug costs.⁶² All individuals sixty-five years of age or older who qualify for Social Security benefits automatically qualify for Medicare Part A.⁶³ While Part A recipients are not required to pay monthly premiums in order to receive Medicare benefits, beneficiaries for Parts B and C are required to make monthly payments in order to receive assistance.⁶⁴

Under the Illinois Public Aid Code, which is administered by the Illinois Department of Healthcare and Family Services (Illinois De-

54. *Wills v. Foster*, 867 N.E.2d 1223, 1227–28 (Ill. App. Ct. 2007), *rev'd*, 892 N.E.2d 1018, 1033 (Ill. 2008).

55. COLEMAN, *supra* note 2, at 1.

56. *Id.* at 5.

57. *Id.*

58. CENTERS FOR MEDICARE & MEDICAID SERVICES, *MEDICARE AND YOU* 2009, at 12 (2008), available at <http://www.medicare.gov/publications/pubs/pdf/10050.pdf>.

59. COLEMAN, *supra* note 2, at 2.

60. *Id.*

61. CENTERS FOR MEDICARE & MEDICAID SERVICES, *supra* note 58, at 12, 43.

62. *Id.*

63. COLEMAN, *supra* note 2, at 2.

64. CENTERS FOR MEDICARE & MEDICAID SERVICES, *supra* note 58, at 43.

partment or Department), the state of Illinois provides assistance to certain classes of individuals, including persons aged sixty five or older, blind persons, and adults with qualifying disabilities.⁶⁵ When determining eligibility for assistance, the Department may consider the recipient's available income.⁶⁶ The Illinois program does not require beneficiaries to make monthly premium payments to receive assistance.⁶⁷ However, in the event of an injury, the Department may obtain a lien on the recipient's property, and if a beneficiary receives an award from a negligent third party who caused the recipient's injuries, the Department may require the recipient to reimburse the state for the expenditures it made on her behalf.⁶⁸

E. Subrogation

One issue that courts and scholars commonly focus on when considering the collateral source rule is a third-party payor's right to subrogation.⁶⁹ The extent to which the entity that actually makes the collateral source payments can recover for its expenditures may have a substantial effect on the plaintiff's recovery. The right of subrogation generally derives from a contract between an insurer and an insured.⁷⁰ Through subrogation, an insurer will generally have a right against any recovery the insured may receive from a third party whose negligence caused the insured's injury.⁷¹ A subrogation right allows the insurer to receive compensation for the payments it made on the insured's behalf by recovering those expenses from any settlement or judgment the insured is awarded from a personal injury suit against a third party.⁷²

Under the federal Medicare statute, if a beneficiary brings a personal injury suit against a third party whose negligence caused the beneficiary's injuries, the government automatically has a subrogation

65. 305 ILL. COMP. STAT. 5/3-1 (2004).

66. 305 ILL. COMP. STAT. 5/6-1.

67. *See id.* (detailing eligibility requirements for general assistance under Illinois Medicaid). When a person qualifies for assistance under the Illinois Code, the state will grant either a "money payment," which is made directly to the recipient, or a "vendor payment," which is made directly to the service provider on behalf of the beneficiary. 305 ILL. COMP. STAT. 5/2-3, -5.

68. 305 ILL. COMP. STAT. 5/11-22A (providing Illinois with a subrogation right to the extent of amounts paid on behalf of the beneficiary for assistance under this Code); 305 ILL. COMP. STAT. 5/3-10 (providing Illinois with lien rights on a beneficiary's property to the extent of amounts paid for assistance on behalf of beneficiary).

69. Zorogastua, *supra* note 33, at 469-70.

70. 46A C.J.S. *Insurance* § 1993 (2007); *see also* GEORGE J. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 61:2-61:3 (2d ed. 1983).

71. COUCH, *supra* note 70, § 61:1.

72. 44A AM. JUR. 2D *Insurance* § 1785 (2003).

right to the beneficiary's recovery.⁷³ This right allows the government to recover the expenditures it made on the injured party's behalf.⁷⁴ In the case of Medicaid, the state and federal governments that paid the beneficiary's expenses possess a similar subrogation right.⁷⁵ Though the government is entitled to compensation for its Medicare or Medicaid payments, the hospitals that actually provide services to the injured parties do not have a similar right.⁷⁶ The healthcare provider that receives the Medicare or Medicaid payments must accept the amount of those payments as payment in full, and that healthcare provider is precluded from pursuing any additional amounts from the beneficiary.⁷⁷ Therefore, when a personal injury plaintiff is a Medicare or Medicaid recipient, her recovery may be subject to subrogation by the federal or state government for the amount those entities paid on the plaintiff's behalf. The plaintiff's recovery, however, will not be reduced by any claim from the healthcare provider that is required to accept the government's payment as payment in full—a payment which may or may not fully compensate the provider for its costs.⁷⁸ Thus, if the provider does not have a subrogation right against a plaintiff's recovery from a third party, the plaintiff could potentially

73. 42 U.S.C. § 1395(y)(b)(2)(B)(iii) (2000) ("The United States shall be subrogated to the extent of payment made under this subchapter for such an item or service to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan.").

74. *Id.*

75. 42 U.S.C. § 1396(a)(25)(A)–(C); 305 ILL. COMP. STAT. 5/11-22A (2004) (providing that the Department shall be subrogated to the extent of the amount of medical assistance the Department provides to a beneficiary who receives payments from a third party for its expenses).

76. *See* 305 ILL. COMP. STAT. 5/11-13 (stating that acceptance of the government payment by or on behalf of the hospital bars that hospital from "obtaining, or attempting to obtain, additional payment therefore from the recipient or any other person"); *Holle v. Moline Pub. Hosp.*, 598 F. Supp. 1017, 1019 (C.D. Ill. 1984) (holding that a hospital that participates in the Medicare program agrees not to charge individuals for services rendered and, therefore, the "hospital may not file a lien for amounts that represent charges for covered services for which Medicare has been billed by the provider, except for deductible or co-insurance amounts"); *Methodist Med. Ctr. v. Ingram*, 413 N.E.2d 402, 408 (Ill. 1980) (holding that 305 ILL. COMP. STAT. 5/22-13 does not deprive hospitals of property without due process of law).

77. *Id.*

78. 42 U.S.C. § 1396(a)(25)(A)–(C) (providing the federal government with a similar subrogation right against the beneficiary's recovery from a third party); 305 ILL. COMP. STAT. 5/11-22A (providing that the Department shall be subrogated to the extent of the amount of medical assistance the Department provides to a beneficiary who receives payments from a third party for its expenses); 305 ILL. COMP. STAT. 5/11-13 (providing that the hospital's acceptance of the payment bars it from attempting to obtain additional payments from other parties); *COLEMAN, supra* note 2, at 21 ("In concept, the prospective payment system (PPS) is intended to pay a hospital a predetermined fee for treating each Medicare patient equal to the average cost of treating a patient with the condition involved. . . . Hospitals that are more efficient than average can profit and those that are less efficient will incur losses under PPS.").

receive an award of compensatory damages for expenses that were never paid by any party.⁷⁹

A similar result could arise in a case involving collateral source payments from a private insurance company if a healthcare provider were to accept a lesser amount from the carrier as payment in full.⁸⁰ However, the key distinction between private insurance claims and those involving Medicare and Medicaid lies in the freedom of contract.⁸¹ If a healthcare provider were to enter into an agreement with an insurance company to accept a lesser payment from that carrier as payment in full, the provider could still presumably reserve its potential subrogation right in the event of a negligence suit.⁸² If the provider failed to reserve this right or expressly waived it, then that decision would be one that the provider entered into freely. The provider therefore would assume responsibility for not receiving full compensation for its services.

In contrast, the law forbids government-funded healthcare providers from reserving or waiving any rights to subrogation.⁸³ In these government funded programs, the government imposes its will on healthcare providers by mandating that they waive their rights to subrogation and accept a lower amount as payment in full.⁸⁴ In order for the situation with these government-funded programs to be analogous to that of private insurance, the private insurance carrier would have to be able to require the healthcare provider to accept its \$50,000 payment as payment in full for the injured party's \$100,000 bill. In addition, it would also have to require the provider to waive all potential subrogation rights. If the parties have equal bargaining power, it is hard to imagine how an insurer could convince a provider to both accept a lesser amount as payment in full and completely waive its right to subrogation. As a matter of contract law, surely it would not

79. See 305 ILL. COMP. STAT. 5/11-13; see also Zorogastua, *supra* note 33, at 469-70.

80. See *Arthur v. Catour*, 833 N.E.2d 847 (Ill. 2005) (allowing the plaintiff to recover "reasonable value" of medical services received even though that amount could exceed the discounted price paid by plaintiff's private insurance company).

81. See *Couch*, *supra* note 70, § 61:2-3.

82. See *id.* (discussing, in general, subrogation rights of insurers). A subrogation right created by contract is referred to as "conventional subrogation," and it is clear that parties are allowed to include these rights in their policies. See *id.* A subrogation right created by contract as opposed to statute may have significance because the right granted by the contract may be broader than those in the statute.

83. See 305 ILL. COMP. STAT. 5/11-13 (stating that acceptance of the government payment by or on behalf of the hospital bars the hospital from pursuing additional amounts from the beneficiary or negligent third party responsible for the injury); *Holle v. Moline Pub. Hosp.*, 598 F. Supp. 1017, 1019 (C.D. Ill. 1984).

84. See 305 ILL. COMP. STAT. 5/11-13.

be difficult for the provider to retain its rights to recover from a judgment against a third party, especially when considering that the amount—the write-off amount—is something that the insurer will not be able to recover itself. Therefore, the particular situation with government-funded programs, which includes mandated acceptance of lower fees and waiver of subrogation rights, is not analogous to situations involving free negotiating between private insurance carriers and hospitals.

F. Jurisdictional Approaches to the Application of the Collateral Source Rule to Medicare and Medicaid

When the Illinois Appellate Court addressed the applicability of the collateral source rule to Medicare and Medicaid in *Wills*, the issue was one of first impression.⁸⁵ However, many other jurisdictions had already addressed this issue.⁸⁶ In general, courts have dealt with this issue in one of three ways: (1) holding that the collateral source rule applies to Medicare and Medicaid in the same manner that it does to private insurance benefits; (2) holding that the collateral source rule does not apply to Medicare and Medicaid; or (3) applying a middle-ground approach in which evidence of the benefits is admissible, but the plaintiff can still recover the reasonable value of the medical services.⁸⁷

In addition to these three common law approaches, legislatures in states such as California, Connecticut, Minnesota, Iowa, Michigan, and Rhode Island have created statutory collateral source rules that determine how the courts deal with Medicare and Medicaid payments.⁸⁸ In all of these states, the legislatures have enacted laws that abrogate or change the common law application of the collateral

85. See *Wills v. Foster*, 867 N.E.2d 1223, 1227 (Ill. App. Ct. 2007), *rev'd*, 892 N.E.2d 1018 (Ill. 2008).

86. See *infra* notes 87, 88, 91 and accompanying text.

87. See *Dyet v. McKinley*, 81 P.3d 1236 (Idaho 2003) (holding that the collateral source rule does not apply to Medicare payments and the plaintiff is limited to recovering amount paid by government); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611 (Miss. 2002) (holding that the collateral source rule applies to Medicaid in the same manner as it does to private insurance payments); *Haselden v. Davis*, 579 S.E.2d 293 (S.C. 2003) (holding that both the amount paid by Medicaid and the amount the physician billed are admissible as evidence, and the plaintiff is entitled to recover reasonable value of services rendered).

88. CAL. CIV. CODE § 3333.1 (West 2000); IOWA CODE § 147.136 (2005); MICH. COMP. LAWS § 600.6303(1), (4) (2000); MINN. STAT. § 548.36 (2000). See also *Zhuta v. Zhuta*, No. CV0440182768S, 2007 WL 2363387 (Conn. July 27, 2007) (analyzing the applicability of the state collateral source rule statute to Medicare and Medicaid); *Esposito v. O'Hair*, 886 A.2d 1197 (R.I. 2005) (discussing the Rhode Island legislative approaches to collateral source rule).

source rule to benefits such as Medicare and Medicaid.⁸⁹ However, in California, Iowa, and Rhode Island, the statutes only change the common law approach of the collateral source rule with respect to medical malpractice cases, so that a healthcare provider whose negligence *causes* a plaintiff's personal injury is provided with an offset in damages for any amount of the plaintiff's expenses that were paid not only by Medicare and Medicaid, but by private insurance as well.⁹⁰ In Michigan, Minnesota, and Connecticut, however, lawmakers have enacted legislation that abrogates the common law collateral source rule for all personal injury cases, not just medical malpractice.⁹¹

A careful reading of these statutes provides insight into the issue of the collateral source rule and government-funded healthcare. Specifically, the statutes recognize an important distinction between collateral source payments for which the payer has a subrogation right, and those in which it does not.⁹² Although this Note focuses only on the common law approaches to the application of the collateral source rule to Medicare and Medicaid, these statutes provide a clear example of legislatures that have recognized that the public policy of opposing excessive damages is more persuasive than any policy supporting the collateral source rule.⁹³ The following Subsections explore the com-

89. See CAL. CIV. CODE § 3333.1; IOWA CODE § 147.136; MICH. COMP. LAWS § 600.6303(1), (4); MINN. STAT. § 548.36.

90. See CAL. CIV. CODE § 3333.1; IOWA CODE § 147.136; R.I. GEN. LAWS § 9-19-34.1 (1997). These states' statutes are less relevant with respect to the issue involved in this Note, because they likely represent a legislative movement to limit medical malpractice cases rather than a movement away from the collateral source rule in general. See generally AM. BAR FOUND., TORT REFORM AND RELATED PROPOSALS: ANNOTATED BIBLIOGRAPHIES ON PRODUCT LIABILITY AND MEDICAL MALPRACTICE (1979).

91. See MICH. COMP. LAWS § 600.6303 (providing that evidence of collateral source payments in conjunction with a personal injury suit is admissible after a verdict for the plaintiff but before judgment is entered: "[I]f the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source . . ."); MINN. STAT. § 548.36 (providing that "when liability is admitted or is determined by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources," the defendant may file a motion requiring both parties to submit evidence of collateral source payments, and the court is required to reduce the damages by any amounts paid by a collateral source that does not have a subrogation right against the plaintiff's award); CONN. GEN. STAT. § 52-225 (2005) (requiring courts to receive evidence of collateral source payments received by the plaintiff from all appropriate parties and to decrease the plaintiff's award by such collateral payments except those for which the payer has a subrogation right against the plaintiff's award).

92. See, e.g., MINN. STAT. § 548.36.

93. See STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW § 10.3.6 (1987) (explaining that the difference between jurisdictional approaches to applying or not applying collateral source rule may depend on whether it matters more to the jurisdiction to deter negligent conduct or avoid overcompensation).

mon law approaches to the application of the collateral source rule to Medicare and Medicaid.

1. *Collateral Source Rule Applies to Medicare and Medicaid*

Courts in at least fifteen states have held that the collateral source rule applies to Medicare and Medicaid in the same manner that it does to private insurance.⁹⁴ In these jurisdictions, a defendant may not submit evidence to show that the plaintiff's medical expenses were paid by Medicare or Medicaid, and the plaintiff's recovery is not reduced by the amount of the payments or write-offs.⁹⁵ These courts generally note that "[t]he tortfeasor who is legally responsible for causing injury is not relieved of his obligation to the victim simply because the victim had foresight to arrange, or good fortune to receive, benefits from a collateral source for injuries and expenses."⁹⁶ The justification for this approach relies both on general principles of deterrence and the policy of favoring an injured party over a wrongdoer in the event that one is to receive a windfall.⁹⁷

2. *Collateral Source Rule Does Not Apply to Medicaid and Medicare*

Prior to the Illinois Appellate Court's decision in *Wills*, courts in seven states concluded that the collateral source rule does not apply to Medicare and Medicaid in the same manner that it does to private insurance.⁹⁸ Under the view adopted by these courts, a defendant is allowed to submit evidence to show that the plaintiff's bills were

94. See *Pipkins v. TA Operating Corp.*, 466 F. Supp. 2d 1255 (D.N.M. 2006); *Dolgen Corp. v. Hanks*, 706 So. 2d 1240 (Ala. Civ. App. 1997); *Powell v. Brady*, 496 P.2d 328 (Colo. Ct. App. 1972); *Pardee v. Suburban Propane, L.P.*, No. Civ.A. 98C-12-206RRC, 2003 WL 21213413 (Del. Super. Ct. May 22, 2003); *Candler Hosp. Corp. v. Dent*, 491 S.E.2d 868 (Ga. Ct. App. 1997); *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676 (Ky. 2005); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611 (Miss. 2001); *Porter v. Toys 'R' Us-Delaware*, 152 S.W.3d 310 (Mo. Ct. App. 2004); *Fickle v. State*, 735 N.W.2d 754 (Neb. 2007); *Cates v. Wilson*, 361 S.E.2d 734 (N.C. 1987); *Handy v. City of Lawton*, 835 P.2d 870 (Okla. 1992); *Papke v. Harbert*, 738 N.W.2d 510 (S.D. 2007); *Coffey v. Noll*, Nos. 01A01-9712-CV-00709, 96C-321, 1999 WL 20778 (Tenn. Ct. App. Jan. 20, 1999); *Dodd v. Lang*, No. CL02000760-00, 2006 WL 2257160 (Va. Cir. Ct. June 29, 2006); *Ellsworth v. Schelbrock*, 611 N.W.2d 764 (Wis. 2000).

95. See, e.g., *Pipkins*, 466 F. Supp. 2d at 1261-62.

96. *Ellsworth*, 611 N.W.2d at 767 (emphasis added).

97. *Id.*

98. See *Loncar v. Gray*, 28 P.3d 928 (Alaska 2001); *Coop. Leasing, Inc. v. Johnson*, 872 So. 2d 956 (Fla. Dist. Ct. App. 2004); *Dyett v. McKinley*, 81 P.3d 1236 (Idaho 2003); *Bates v. Hogg*, 921 P.2d 249 (Kan. Ct. App. 1996) (superseded by statute); *Bozeman v. State*, 879 So. 2d 692 (La. 2004); *Kastick v. U-Haul Co.*, 740 N.Y.S.2d 167 (N.Y. App. Div. 2002); *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786 (Pa. 2001).

paid—or partially written off—by Medicare, Medicaid, or both.⁹⁹ Rather than allowing a plaintiff to recover the amount of her medical care, plaintiffs whose expenses are paid and partially written off by Medicare and Medicaid—not private insurance—are limited to recovering the amount the government actually paid.¹⁰⁰

These courts do not argue that the collateral source rule should be abolished; rather, they distinguish Medicare and Medicaid from those types of collateral sources that generally fall under the rule.¹⁰¹ One court explained that Medicare and Medicaid write-offs, although not technically collateral sources, are not an “item of damages for which [the] plaintiff may recover because [the] plaintiff has incurred no liability therefore.”¹⁰² These courts generally refer to the purpose of compensatory damages and note that a plaintiff should not be allowed to recover the cost of medical bills when she did not incur any expense, obligation, or liability in relation to those charges.¹⁰³

In contrast, those plaintiffs whose expenses are paid by their private insurance carriers are allowed to recover the full amount charged by the hospital, even if that amount is in excess of the amount paid, because those plaintiffs have incurred obligations or expenses—generally in the form of monthly premium charges—in order to receive their benefits.¹⁰⁴ Perhaps, in the view adopted by these courts, the plaintiffs’ recoveries in such cases are not contrary to the public policy against overcompensation because the plaintiffs have incurred expenses and contracted to receive such benefits.¹⁰⁵

3. Reasonableness Approach

Courts in at least five jurisdictions have taken a middle-ground approach to the application of the collateral source rule’s applicability to Medicare and Medicaid.¹⁰⁶ This approach differentiates the evidentiary and damage aspects of the collateral source rule by rendering the evidence of Medicare and Medicaid amounts admissible, while denying an automatic limitation of the plaintiff’s recovery to such

99. See, e.g., *Bozeman*, 879 So. 2d at 703–04.

100. See, e.g., *Dyet*, 81 P.3d at 1239.

101. See, e.g., *id.*

102. *Id.*

103. See, e.g., *Coop. Leasing*, 872 So. 2d at 958.

104. See *Bozeman*, 879 So. 2d at 703–04.

105. See *id.*

106. See *Lopez v. Safeway Stores, Inc.*, 129 P.3d 487 (Ariz. Ct. App. 2006); *Bynum v. Magno*, 101 P.3d 1149 (Haw. 2004); *Robinson v. Bates*, 828 N.E.2d 657 (Ohio Ct. App. 2005); *Haselden v. Davis*, 579 S.E.2d 293 (S.C. 2004); *Wong v. Graham*, No. 03-00-00440-CV, 2001 WL 123932 (Tex. App. Feb. 15, 2001).

amounts.¹⁰⁷ Under this approach, the plaintiff is entitled to recover the reasonable value of the medical services she received as a result of the defendant's negligence.¹⁰⁸ The plaintiff bears the burden of establishing the reasonableness of the expenses she incurred, and the hospital bills and amounts paid by Medicare, Medicaid, or both are admissible to establish that amount.¹⁰⁹

Many jurisdictions have adopted different approaches to the application of the collateral source rule to Medicare and Medicaid.¹¹⁰ The three approaches discussed in this Section are distinguished by and based on policy decisions relating to damages, specifically compensation and subrogation. In some jurisdictions, courts favor the public policy opposing double recoveries, while in other jurisdictions, courts attempt to ensure that negligent parties bear the full responsibility—in the form of damages paid to the plaintiff—for their conduct.¹¹¹

III. SUBJECT OPINION: *WILLS v. FOSTER*

In 2007, the Illinois Appellate Court considered whether the collateral source rule applies to payments from Medicare and Medicaid.¹¹² As a matter of first impression, the court held that the collateral source rule does not apply to these benefits and, therefore, the court limited the plaintiff's recovery to the amount actually paid to the medical provider.¹¹³ In reaching this conclusion, the appellate court aligned Illinois with states such as Florida, Idaho, Louisiana, Alaska, New York, Kansas, and Pennsylvania, all of which have held that the collateral source rule does not apply to Medicare and Medicaid.¹¹⁴ Thereafter, the Illinois Supreme Court reversed the appellate court's decision, holding that the collateral source rule applies to Medicare and Medicaid in the same manner as it does to private insurance.¹¹⁵

107. See, e.g., *Haselden*, 579 S.E.2d at 295.

108. *Id.*

109. *Id.*

110. See *supra* notes 19–84 and accompanying text.

111. See *Dyett v. McKinley*, 81 P.3d 1236 (Idaho 2003) (limiting plaintiff's recovery to amount paid by Medicare and Medicaid, refusing to allow potential double recovery in light of amounts written off by hospital and never actually paid); *Haselden*, 579 S.E.2d at 295 (finding that allowing plaintiff to recover reasonable value of expenses incurred ensures more accurate, consistent results); *SHAVELL*, *supra* note 93, § 10.3.6 (providing that this determination often amounts to a policy decision, which requires the court or legislature to choose whether it prefers deterring negligent conduct more than avoiding overcompensation).

112. See *Wills v. Foster*, 867 N.E.2d 1223 (Ill. App. Ct. 2007), *rev'd*, 892 N.E.2d 1018 (Ill. 2008).

113. *Id.* at 1228.

114. See *supra* note 98 and accompanying text.

115. *Wills v. Foster*, 892 N.E.2d 1018, 1034 (Ill. 2008).

In this case, Sheila Wills and two passengers were injured in an automobile accident when the defendant, Inman Foster, drove through a red light and struck Wills's vehicle.¹¹⁶ As a result of this accident, Wills aggravated a preexisting back injury and had to undergo surgery for a spinal-cord fusion.¹¹⁷ The medical expenses for Wills's injuries totaled \$80,163.47.¹¹⁸ At the time Wills received care for her injuries, she was a beneficiary of Medicare and Illinois Medicaid.¹¹⁹ In satisfaction for the services Wills received, these programs paid the health-care provider a total of \$19,005.05.¹²⁰ The provider essentially wrote off the difference between these amounts.¹²¹

Following the automobile accident, Wills filed a personal injury suit against Foster, and both individuals filed motions *in limine* regarding Wills's medical expenses.¹²² Foster argued that Wills should be prevented from submitting evidence of medical expenses in excess of the amount paid by the government programs, and Wills motioned for the court to deny the defendant's attempts to submit evidence of those amounts.¹²³ The trial court granted Wills's motion, which allowed the jury to consider the full monetary value of the medical treatment.¹²⁴ The jury returned a verdict for Wills, but the trial court later granted Foster's post-trial motion to reduce the medical damages from the full amount billed, \$80,163.47, to the amount paid by the government programs, \$19,005.05.¹²⁵

Wills subsequently appealed that determination and argued that the trial court erred in reducing her damages.¹²⁶ In support of this position, she argued that the trial court's conclusion was inconsistent with the Illinois Supreme Court's decision in *Arthur v. Catour*.¹²⁷ On appeal, Foster argued that the trial court correctly reduced Wills's damages and that the case was distinguishable from *Arthur*.¹²⁸ The majority of the appellate court's opinion focused on the *Arthur* case and its implications for the current issue.¹²⁹

116. *Wills*, 867 N.E.2d at 1224.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *See Zorogastua, supra* note 33, at 468–70.

122. *Wills*, 867 N.E.2d at 1224.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1225.

127. *Id.*; *see Arthur v. Catour*, 833 N.E.2d 847 (Ill. 2005).

128. *Wills*, 867 N.E.2d at 1225.

129. *See id.* at 1225–29.

In *Arthur*, an invitee brought a personal injury suit against the defendant landowner for injuries she sustained when she stepped in a hole in the defendant's yard.¹³⁰ The plaintiff sought to recover \$19,355.25 for medical treatment she received as a result of her injuries.¹³¹ The plaintiff's medical insurer, however, paid only \$13,577.97 in full satisfaction of the services the plaintiff received.¹³² The trial court held that the plaintiff could not recover more than the amount paid by her insurer, but the appellate court reversed and held that the plaintiff's damages were not limited to that amount.¹³³ In its opinion in *Arthur*, the Illinois Supreme Court discussed the policy reasons supporting the collateral source rule and then held that the plaintiff was not limited to recovering the amount paid by her insurer.¹³⁴ The court referred to general damage principles and held that the plaintiff was entitled to recover the reasonable value of the medical services she received in connection with her personal injury.¹³⁵ The court reasoned that the discount for the services occurred as a result of the plaintiff's actions in securing insurance and therefore found that she should be allowed to recover the full amount billed for the services—the benefit of her bargain.¹³⁶

After analyzing the *Arthur* case, the appellate court in *Wills* noted that *Arthur* only addressed the issue of discounts associated with a plaintiff's private insurance.¹³⁷ In addition, the court stated that *Arthur* did not address the previous decision of *Peterson v. Lou Bachrodt Chevrolet Co.*¹³⁸ In *Peterson*, the Illinois Supreme Court held that a plaintiff could not recover for expenses without incurring liability therefor.¹³⁹ The *Wills* appellate court stated that “[i]n effect, the *Arthur* holding created . . . a windfall in favor of the plaintiff,” and because the *Arthur* court failed to overrule *Peterson*, the court applied the *Peterson* ruling to its case.¹⁴⁰ In doing so, the court held that *Wills* was limited to recovering the amount actually paid by Medicare and

130. *Arthur*, 833 N.E.2d at 849–50. “Invitee” is a term used in premises liability to define a certain type or class of visitors. 65A C.J.S. *Negligence* § 452 (2000).

131. *Arthur*, 833 N.E.2d at 850.

132. *Id.*

133. *Id.*

134. *Id.* at 853–54.

135. *Id.* at 853.

136. *Id.* at 853.

137. *Wills v. Foster*, 867 N.E.2d 1223, 1226 (Ill. App. Ct. 2007), *rev'd*, 892 N.E.2d 1018 (Ill. 2008).

138. *Id.*

139. *Id.* (citing *Peterson v. Lou Bachrodt Chevrolet, Co.*, 392 N.E.2d 1, 5 (1979)).

140. *Id.* at 1227.

Medicaid for her medical expenses.¹⁴¹ Like the plaintiff in *Peterson*, Wills did not incur expenses or bargain for the benefits she received; she was simply a third-party beneficiary to the contract between the government and her healthcare provider.¹⁴² The court concluded that the plaintiff could not recover in excess of the amount paid because she never became liable for those expenses, never paid any premiums or similar payments to secure those benefits, and did not bargain for the discount provided to her by the government contracts.¹⁴³

After the appellate court affirmed *Wills*, the Illinois Supreme Court reversed the lower court's ruling.¹⁴⁴ The Illinois Supreme Court framed the issue on appeal as "whether the trial court erred in reducing the jury's award of medical expenses to the amount actually paid by Medicaid and Medicare in full settlement of the bills."¹⁴⁵ In its opinion, the Illinois Supreme Court adopted an approach whereby the plaintiff is allowed to recover the reasonable value of her medical expenses regardless of whether those expenses were paid by another party, only paid in part pursuant to governmental programs, or never charged at all.¹⁴⁶ Thus, a plaintiff can recover the reasonable value of medical services provided to her free of charge.¹⁴⁷ For this latter rea-

141. *Id.* at 1228.

142. *Id.*

143. *Wills*, 867 N.E.2d. at 1227–28. One dissenting justice on the appellate panel for *Wills*, Justice Cook, disagreed that the *Peterson* case prevented the plaintiff from recovering more than the amount paid by Medicare and Medicaid. *See id.* at 1228–29 (Cook, J., dissenting). Justice Cook distinguished *Peterson* by arguing that the plaintiff in *Peterson* was not analogous to the plaintiff in *Wills* because one received gratuitous medical care from a philanthropic third party, while the other simply had her healthcare paid for by the government because she could not afford private insurance. *Id.* Justice Cook stated that "[a] Medicare or Medicaid recipient is not the lucky receiver of the generosity of some benevolent third party, but rather a needy person who did not have the ability or resources to acquire private insurance." *Id.* at 1229. In Justice Cook's view, whether a plaintiff who receives medical treatment free of charge can recover the value of that treatment depends on whether the plaintiff is lucky or poor. If a plaintiff simply received care from a benevolent doctor who happened to be at the right place at the right time, the plaintiff does not have compensatory damages in the form of medical expenses. However, if a plaintiff receives medical care at a hospital, and her services are paid at no cost to her, she nonetheless has compensatory damages for those expenses. Justice Cook failed to support his argument with case law, and his distinction between lucky and poor does not seem to be supported by the majority of Illinois cases addressing the collateral source rule. *See, e.g.*, Arthur v. Catour, 833 N.E.2d 847, 850–54 (Ill. 2005) (discussing general background of collateral source rule in Illinois). Because Justice Cook's argument is less inclusive than the Illinois Supreme Court's opinion, this Note focuses on the latter.

144. *Wills v. Foster*, 892 N.E.2d 1018, 1034 (Ill. 2008).

145. *Id.* at 1020.

146. *See id.* at 1029–31.

147. *Id.*

son, *Peterson* was inconsistent with *Wills* and, therefore, was overruled.¹⁴⁸

In deciding the *Wills* case, the Illinois Supreme Court recognized the inconsistencies in Illinois case law regarding the collateral source rule, discussed the rule's origins and justifications, and adopted an approach that allows plaintiffs to recover the full amount billed for medical services.¹⁴⁹ The Illinois Supreme Court began its discussion with an overview of the collateral source rule, noting that “[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.”¹⁵⁰ The court recognized that the collateral source rule is inconsistent with the compensatory nature of these damages, but it stated that the rule is an “established exception to the general rule that damages in negligence actions must be compensatory.”¹⁵¹

After providing a brief overview of the collateral source rule, the court questioned whether *Peterson* survived *Arthur*.¹⁵² The court reviewed the three approaches identified by different jurisdictions addressing the application of the collateral source rule to Medicare and Medicaid.¹⁵³ The court’s discussion focused heavily on the different sections of the Restatement (Second) of Torts that relate to the collateral source rule and compensatory damages.¹⁵⁴ The court noted that the cases that limit the application of the collateral source rule and restrict the amount of damages recoverable by the plaintiff tend to focus on sections of the Restatement that explain the general require-

148. *Id.* at 1031.

149. *Id.* at 1022–34.

150. *See Wills*, 892 N.E.2d at 1022–25 (quoting RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979)).

151. *Id.* (quoting 25 C.J.S. *Damages* § 172 (2002)).

152. *Id.* at 1023–31.

153. *Id.* (noting three general approaches to the issue of the collateral source rules applicability to Medicare and Medicaid). The court termed these three approaches “(1) actual amount paid; (2) benefit of the bargain; and (3) reasonable value.” *Id.* These names differ somewhat from how the approaches were termed in this Note, but the substance of each approach is similar. Under the court’s view of the “actual amount paid” approach, plaintiffs are limited to recovering the amount actually paid by government. *Id.* at 1025–26. Under the benefit-of-the-bargain approach, plaintiffs who actually pay or bargain for their insurance are allowed to recover the full amount billed while those who receive coverage free of charge are limited to the amount paid, which draws a distinction between private insurance and governmental healthcare or gratuitously provided services. *Id.* at 1026–27. The reasonable-value approach allows plaintiffs to recover the reasonable value of health services, but the court distinguishes between jurisdictions that allow the actual amount paid to be admissible as evidence of reasonableness. *Id.* at 1027–29.

154. *Id.* at 1025–29.

ments of compensatory damages.¹⁵⁵ In contrast, those courts that apply the collateral source rule to Medicare and Medicaid benefits to its full extent focus on sections of the Restatement,¹⁵⁶ which arguably support the full application of the collateral source rule to these governmental healthcare benefits.¹⁵⁷ Thus, the court overruled *Peterson* and expressly adopted the “reasonable value approach,” which allows plaintiffs to recover the reasonable value of their medical expenses and prohibits defendants from submitting evidence of the amounts paid by Medicare and Medicaid in an attempt to establish a lower recovery.¹⁵⁸ Furthermore, consistent with Illinois law—which prescribes that a medical bill is only *prima facie* reasonable if it is paid in full—the court held that plaintiffs cannot rely on the bill itself to establish the reasonable value of their expenses.¹⁵⁹ The plaintiff must present additional testimony or evidence to establish the reasonableness of the amount charged.¹⁶⁰

The court provided four reasons for adopting its version of the reasonable-value approach.¹⁶¹ Two of these justifications relate only to persuasive support for the adopted rule and do little to help determine how the underlying principles of compensation and the collateral source rule apply to this situation.¹⁶² A third justification is based on criticisms of the benefit-of-the-bargain approach.¹⁶³ The court stated that an approach that would only allow a plaintiff to recover the full amount billed if she had bargained for or incurred some expense to secure her insurance coverage undermines the collateral source rule itself.¹⁶⁴ In the court’s view, this approach would unfairly distinguish between plaintiffs and is in contrast to the general principle that “[t]he collateral source rule ensures that the liability for similarly situated defendants is not dependent on the relative fortuity of the manner in which each plaintiff’s medical expenses are financed.”¹⁶⁵

155. *Id.* at 1027–28.

156. *See id.* at 1028–29.

157. *See Wills*, 892 N.E.2d at 1028–29.

158. *Id.* at 1031.

159. *Id.* at 1033–34.

160. *Id.* at 1033.

161. *Id.* at 1030–31.

162. *See id.* (noting that two justifications for the adoption of this rule were the support found in the comments section of RESTATEMENT (SECOND) OF TORTS § 920A and the cases from other jurisdictions that have adopted the rule).

163. *Wills*, 892 N.E.2d at 1030–31.

164. *Id.*

165. *Id.* (quoting *Leitinger v. DBart, Inc.*, 736 N.W.2d 1, 10 (2007)).

Finally, the court noted that the rule provided in *Arthur* was meant to cover situations involving Medicare and Medicaid.¹⁶⁶ In discussing the policy justifications for the rule, the court stated that “the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts *or other relations* that may exist between the injured party and third persons.”¹⁶⁷ The majority of influential collateral source cases in Illinois rely on this justification.¹⁶⁸ However, in this instance, the Illinois Supreme Court focused on the “other relations” language for the first time, and in doing so, it held that the rule was clearly intended to cover the relationship between government-funded healthcare and beneficiaries of those programs.¹⁶⁹ Although this interpretation of the rule seems clear, the Illinois courts have never focused on this aspect of the rule prior to this case.

It is important to note that the Illinois Supreme Court did not exactly adopt the reasonable-value approach as it is described in this Note.¹⁷⁰ The court essentially adopted an approach whereby the collateral source rule applies to Medicare and Medicaid in the same manner that it does to private insurance.¹⁷¹ Thus, under the Illinois Supreme Court’s approach, the plaintiff receives the full reasonable value of the medical expenses, but the amount paid by the government programs is still rendered inadmissible—whereas in the typical reasonable-value approach, evidence of such amounts is admissible to determine “reasonableness.”¹⁷²

IV. ANALYSIS

This Part analyzes *Wills* and the applicability of the collateral source rule to Medicare and Medicaid.¹⁷³ Section A critiques and analyzes the appellate court’s opinion in *Wills*.¹⁷⁴ Section B argues that the

166. *Id.* at 1031.

167. *Id.* (quoting *Arthur v. Catour*, 833 N.E.2d 847 (Ill. 2005)).

168. *See, e.g., Arthur*, 833 N.E.2d at 850; *Wilson v. Hoffman Group, Inc.*, 546 N.E.2d 524 (Ill. 1989).

169. Compare *Wills*, 892 N.E.2d at 1030–31, with *Arthur*, 833 N.E.2d at 850, and *Wilson*, 546 N.E.2d at 530.

170. *See Wills*, 892 N.E. 2d at 1031. Although the Illinois Supreme Court uses the “reasonable-value” label, this Note describes that approach as one which applies the collateral source rule in the same manner to Medicare and Medicaid as it does to private insurance. Compare *id.* at 1029–31 (adopting an approach whereby the plaintiff is entitled to recover the reasonable value of her medical expenses, but the defendant is not permitted to submit evidence of the actual amount paid for those medical services), with *supra* notes 106–109 and accompanying text.

171. *Wills*, 892 N.E.2d at 1031.

172. *Id.*

173. *See infra* notes 176–238 and accompanying text.

174. *See infra* notes 176–195 and accompanying text.

Illinois Supreme Court erred in overturning the appellate court and explains the appropriate analysis for determining that the collateral source rule should not apply to Medicare and Medicaid benefits in the same manner that it does to private insurance.¹⁷⁵

A. *Rationale and Sufficiency of the Appellate Opinion in Wills*

The appellate decision in *Wills* turned on the majority's determination of which Illinois Supreme Court case, *Arthur* or *Peterson*, was more factually similar to the case before the court. The court explained that "[b]ecause the *Arthur* court did not specifically overrule *Peterson*, we must continue to follow *Peterson* as it is the case more factually similar to the case *sub judice*."¹⁷⁶ Consistent with this view, the *Wills* appellate court held that the plaintiff could not recover more than the amount paid by Medicare and Medicaid because she received her treatment at no cost to her, just like the plaintiff in *Peterson*.¹⁷⁷ While the court's reliance on the Illinois Supreme Court cases is not unfounded, this limited analysis prevented the court from determining whether the collateral source rule *should* apply to these benefits based on the arguments underlying the rule itself.

Despite the majority's reliance on *stare decisis*, it stated the rule correctly and provided several of the rule's primary supporting arguments.¹⁷⁸ Specifically, the court recognized that the collateral source rule is justified as a deterrent to tortfeasors and that it will typically not violate the policy opposing double recoveries because the insurer will have a lien or subrogation right on the plaintiff's award or settlement.¹⁷⁹ After noting that the Restatement (Second) of Torts cites deterrence as a justification for the collateral source rule, however, the court never again mentioned this purpose in its opinion.¹⁸⁰ Though the court properly concluded that the collateral source rule does not apply to Medicare and Medicaid, the court never fully addressed the deterrence purpose of the rule, a purpose that the court itself noted as a traditional justification for refusing to admit evidence of collateral sources.¹⁸¹

175. See *infra* notes 196–238 and accompanying text.

176. *Wills v. Foster*, 867 N.E.2d 1223, 1227 (Ill. App. Ct. 2007), *rev'd*, 892 N.E.2d 1018 (Ill. 2008).

177. *Id.* at 1228.

178. See *id.* at 1226–27.

179. *Id.* at 1226.

180. *Id.*

181. See *id.*

The appellate opinion also addressed the double recovery and subrogation aspects of the collateral source rule.¹⁸² At the outset, the court stated that this rule is an exception to the general prohibition of double recoveries in Illinois, but in the majority of cases, even when the collateral source rule applies, the plaintiff will not be overcompensated because the insurer's subrogation right will decrease the plaintiff's award.¹⁸³ The court, however, recognized that for collateral payments made pursuant to Medicare or Medicaid, the hospitals that provide services to the plaintiff will not have a right of subrogation.¹⁸⁴ Therefore, in contrast to the situation associated with private insurance, if the collateral source rule applied to these benefits, a plaintiff would likely receive a double recovery in violation of Illinois's general prohibition of such a result.¹⁸⁵ Furthermore, the appellate court implied that the existence of a subrogation right was the key fact that distinguished *Wills* from *Arthur*:

In effect, the *Arthur* holding created what seemed to be a windfall in favor of the plaintiff. We discern that the primary reason for such a holding was the existence of the insurance contract. This would explain the justification for allowing an apparent windfall for the plaintiff—a concept that had been earlier rejected in *Peterson*. Perhaps the *Arthur* court presumed the insurance company would enforce a subrogation lien.¹⁸⁶

Although the court used subrogation as a distinguishing element of its analysis, the majority's opinion was primarily based on the benefit-of-the-bargain justification of the collateral source rule.¹⁸⁷ Generally, this argument justifies the collateral source rule when dealing with benefits a plaintiff receives from a third party with whom she contracted with on her own behalf.¹⁸⁸ A court relying on this justification will allow a plaintiff to recover more than the discounted amount paid by her insurer because such a recovery, in a sense, allows the plaintiff to receive the benefit of her efforts to secure the insurance.¹⁸⁹

The *Wills* appellate court, however, consistently referred to the benefit-of-the-bargain justification while focusing on the plaintiff's ex-

182. *Wills*, 867 N.E.2d at 1226, 1228.

183. *Id.* at 1226.

184. *Id.* at 1228 (noting that under 305 ILL. COMP. STAT. 5/11-13 (2004), healthcare providers have agreed that acceptance of payments from Medicare and Medicaid constitutes full satisfaction of the provider's fees, which prevents the provider from seeking reimbursement of any additional amounts from the patient).

185. *See id.*

186. *Id.* at 1226–27 (internal citation omitted).

187. *See id.* at 1227.

188. *See Zorogastua, supra* note 33, at 491–95.

189. *Id.*

penditures relating to the benefits received, rather than the bargain itself.¹⁹⁰ The court failed to address any argument that “bargained for” could be read in a broader sense to include more than consideration in the form of monthly premium payments or other expenditures more commonly associated with private insurance. Moreover, the court failed to consider that a focus on expenditures for the benefit-of-the-bargain justification would ultimately lead to the conclusion that only some Medicare and Medicaid recipients would be limited to recovering the amount paid by these governmental programs. The practical result of the *Wills* appellate court’s holding—which indicates that the plaintiff’s expenditures are the key factor for determining whether or not it can recover the full amount of its medical bills—is that only some, not all, of the beneficiaries of these programs would be prohibited from recovering the full amount of their bills.¹⁹¹ Considering the court’s discussion of the importance of subrogation rights when dealing with the collateral source rule, and the fact that the subrogation rights would be the same with all the Medicare programs, it is unlikely that the court intended this result.¹⁹²

In light of the numerous arguments both for and against the collateral source rule, it is clear that the appellate opinion in *Wills* was not a comprehensive assessment of this rule in the context of Medicare and Medicaid. The opinion notes three of the main purposes behind the collateral source rule: deterrence, subrogation rights, and the benefit-of-the-bargain justification.¹⁹³ The distinction from *Arthur* on the grounds of subrogation is a well-founded argument, but the majority’s conclusion is based primarily on a limited interpretation of the benefit-of-the-bargain approach.¹⁹⁴ In addition, the majority failed to address the deterrence argument or the compensation principles that further support its position, and it omitted any discussion of the policy of awarding a windfall for the plaintiff as opposed to the tortfeasor.

190. *Wills*, 867 N.E.2d at 1227 (“[T]he justification for the rule was the ideal that the ‘wrongdoer should not benefit from the *expenditures made by the injured party* in procuring insurance coverage.’” (quoting *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (1979))). “Without an expenditure, liability, or obligation on the plaintiff’s part, application of the [collateral source] rule was not justified.” *Id.* “Akin to the plaintiff in *Peterson*, those individuals . . . covered by Medicaid or Medicare do not make ‘expenditures’ and have not bargained for their coverage.” *Id.* at 1228.

191. See *Zorogastua*, *supra* note 33, at 491–95. The appellate court’s approach would treat Medicare beneficiaries differently, because although the beneficiaries of Part A do not pay for their coverage, those of Parts B, C, and D pay some monthly expenditure for their coverage. See *supra* notes 58–64 and accompanying text.

192. See *Wills*, 867 N.E.2d at 1226.

193. *Id.* at 1226–27.

194. See *id.* at 1225–28.

Nonetheless, considering some of the more unpersuasive arguments posed by the dissent, it is clear how the majority opinion reached its result.¹⁹⁵

B. Proposed Analysis for the Application of the Collateral Source Rule to Medicare and Medicaid

The appellate court's ultimate conclusion in *Wills* was correct, but the court's opinion failed to fully address the arguments both for and against the application of the collateral source rule to Medicare and Medicaid. In determining whether the collateral source rule should apply to Medicare and Medicaid, the supreme court should have reviewed the justifications behind this rule, compared them with the arguments opposing the application of this rule, and then determined how the balance of these arguments mandated its conclusion.

This Section outlines the correct approach the Illinois Supreme Court should have taken by analyzing five main arguments associated with this issue. First, this Section discusses three traditional justifications for the collateral source rule: (1) deterring tortious conduct;¹⁹⁶ (2) favoring a windfall for the plaintiff over a credit to the tortfeasor;¹⁹⁷ and (3) allowing the plaintiff to receive the benefit of her bargain.¹⁹⁸ This Section then analyzes two aspects of damages that contrast the arguments in support of the collateral source rule: the purpose of compensatory damages¹⁹⁹ and the prohibition against double recovery.²⁰⁰ Finally, this Section concludes that the Illinois Supreme Court erred in overturning *Wills* on appeal.

1. Deterrence of Tortious Conduct

A traditional argument in support of the collateral source rule is the principle that refusing to offset a plaintiff's damages by amounts paid by independent third parties helps deter tortious conduct.²⁰¹ As stated by the Seventh Circuit Court of Appeals, "The idea behind the collateral-benefits doctrine . . . is that damages measured by the injury are essential to deterrence."²⁰² While an analysis of case law reveals that deterrence has not been the primary motivating factor behind the

195. *See id.* at 1228–29; *supra* note 143.

196. *See infra* notes 201–206 and accompanying text.

197. *See infra* notes 207–211 and accompanying text.

198. *See infra* notes 212–220 and accompanying text.

199. *See infra* notes 221–223 and accompanying text.

200. *See infra* notes 224–238 and accompanying text.

201. *See, e.g.*, *U.S. Can Co. v. NLRB*, 254 F.3d 626, 631 (7th Cir. 2001); *Zorogastua, supra* note 33, at 476–77; *SHAVELL, supra* note 93, §§ 6.67, 10.3.

202. *U.S. Can Co.*, 254 F.3d at 631.

collateral source rule in Illinois,²⁰³ courts have relied on this rationale in other jurisdictions,²⁰⁴ and, for that reason, it is relevant to the determination of whether the rule should apply to Medicare and Medicaid.

The implication of the deterrence argument is that tortfeasors will be dissuaded—in fact, deterred—from acting negligently if they are required to pay the full amount of the expenses a healthcare provider charges for services it renders as a result of the tortfeasors' conduct. As with most deterrence arguments, the actual effect on negligent conduct depends on the awareness of the potential tortfeasor.²⁰⁵ If a potential tortfeasor is aware of the amount of damages she would be required to pay as a result of acting negligently, that knowledge could deter her wrongful conduct. However, if that tortfeasor is unaware of the costs she would incur or simply does not think of such costs prior to acting, she would not be deterred by the impending costs of her conduct. With respect to the benefits involved in this case, the appropriate questions are simple. First, does refusing to allow a tortfeasor a setoff in damages for the amounts paid by Medicare and Medicaid actually deter negligent conduct? Second, does forcing the defendant to pay the full amount of medical expenses billed to the plaintiff, rather than the amount actually paid by the government, deter that specific defendant?

The deterrence argument is a difficult one to address in this situation because any belief in the deterrent effect of the collateral source rule is dependant on the presumptions of the subjective beliefs of the potential tortfeasors. In other words, the answers to these deterrence questions depend on the extent to which one thinks that potential tortfeasors contemplate the actual cost of their conduct before acting negligently. It is difficult to conclusively determine how much the value of damages deters conduct. Nonetheless, when considering the fact scenarios at issue here, it is hard to believe that refusing to offset damages would provide additional deterrence to negligent conduct. A driver is not likely to think about the age or Medicare eligibility of a potential plaintiff while driving down the road. Therefore, even if a person were aware that she would not have to pay the full value of medical bills if she injured a Medicare-eligible individual, such knowledge would not likely affect her conduct one way or another.

203. See *Arthur v. Catour*, 833 N.E.2d 847, 852 (Ill. 2005) (noting that the justification for the collateral source rule is that a defendant should not benefit from the injured party's expenditures).

204. See *Zorogastua*, *supra* note 33, at 476–77 (providing that deterrence and accountability are the primary justifications for the collateral source rule in Kansas, a state in which the rule has been criticized and abrogated in part by the legislature).

205. SCHAVELL, *supra* note 93, § 6.67.

Furthermore, even with respect to deterrence of specific defendants, a defendant who is forced to pay the additional write-off amount is not likely to be more deterred than one who is not required to pay that amount. After all, these cases deal with only a small part of the total damage award, so an offset for the write-off amounts will not have a large impact on the total amount awarded to the plaintiff. Although this argument is inconclusive, its importance is further lessened in Illinois because courts have consistently referred to the collateral source rule without noting any deterrence principles supporting its application.²⁰⁶ Therefore, the ultimate conclusion on the applicability of the collateral source rule to Medicare and Medicaid can be determined by simply addressing the two most common justifications used in Illinois, in addition to the general principles of compensatory damages. In a sense, the deterrence factor does not cut strongly for either side, but, nevertheless, this decision can be sufficiently supported without conclusive evidence of the actual deterrence effect of the collateral source rule—evidence which in all likelihood does not exist.

2. *Favoring a Plaintiff over the Tortfeasor When Confronted with an Inevitable Windfall*

The windfall justification for the collateral source rule is based on policy. According to this argument, the collateral source rule prevents a tortious party from reducing the plaintiff's damages, because to allow such a reduction would amount to an undeserved benefit to the wrongdoer.²⁰⁷ Essentially, this justification presumes that a windfall is inevitable in situations involving collateral source payments. If the plaintiff is allowed to recover in excess of the collateral payments, she would receive a windfall. Conversely, if the defendant is not required to pay the full amount of the damages, she would receive a windfall from the relief of payment. The Northern District of Illinois stated this principle:

In a sense any answer to the collateral source question in the typical personal injury case can be viewed as a kind of windfall. To a plaintiff the money from the collateral source, plus the receipt of undiminished damages from the tortfeasor defendant, represents a double recovery. Conversely, to allow a defendant to reduce his or her damages liability by the amount plaintiff has already received

206. See, e.g., *Arthur*, 833 N.E.2d at 851; *Wilson v. Hoffman Group, Inc.*, 546 N.E.2d 524, 530 (Ill. 1989); *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979), *overruled by* *Wills v. Foster*, 892 N.E.2d 1018 (Ill. 2008); *Lopez v. Morley*, 817 N.E.2d 592, 598 (Ill. App. Ct. 2004); *First Midwest Trust Co. v. Rogers*, 701 N.E.2d 1107, 1118 (Ill. App. Ct. 1998).

207. See *State Sec. Ins. Co. v. Frank B. Hall & Co.*, 109 F.R.D. 95, 96 (N.D. Ill. 1985).

from the collateral source would mean the tortfeasor has escaped paying for all the harm caused by his or her wrong.²⁰⁸

Illinois courts have consistently applied the collateral source rule and allowed the plaintiff to potentially receive a windfall because, as a matter of public policy, it is better to allow a plaintiff to receive a windfall than for the court to reduce the liability in favor of the wrongdoer.²⁰⁹

A number of critiques become apparent when considering the windfall justification for the collateral source rule and how this justification applies to Medicare and Medicaid. The primary critique, however, is that the basic presumption of an inevitable windfall is misplaced. Courts relying on this justification believe that requiring an offset in damages would amount to a windfall for the defendant.²¹⁰ However, requiring the defendant to pay an amount equal to that which was actually received by the healthcare provider would not amount to a windfall in the defendant's favor. From a general standpoint of compensation, the only entity entitled to the difference between the amount paid and the amount charged is the healthcare provider itself. The entity is not allowed to recover that amount because it must accept the Medicare and Medicaid payments as payments in full—it does not have the right to contract for that right as would a private insurer.²¹¹ If the healthcare provider has no right to recover that amount, a court's refusal to require a defendant to pay that amount would not result in a windfall. After all, the only damages at issue here are those for medical expenses, and the presumption of a windfall is therefore misplaced. It is important to note that the *Wills* holding has no effect on damages for pain and suffering, emotional distress, or punitive damages; this issue simply affects damages related to medical expenses. When a plaintiff has no out-of-pocket pecuniary loss requiring compensation, refusing to require a defendant to pay damages to represent such an amount does not result in a windfall benefit to that party. Thus, the windfall justification for the collateral source rule does not support the application of the rule to Medicare and Medicaid write-offs.

208. *Id.* at 96.

209. *See id.*; *Arthur*, 833 N.E.2d at 852 (citing RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979)); *Wilson*, 546 N.E.2d at 530–31; *Lopez*, 817 N.E.2d at 598; *First Midwest Trust Co.*, 701 N.E.2d at 1118.

210. *See, e.g., Arthur*, 833 N.E.3d at 852 (citing RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979)).

211. *See supra* notes 73–76 and accompanying text.

3. *Benefit-of-the-Bargain Justification for the Collateral Source Rule*

The primary justification for the collateral source rule in Illinois is the benefit-of-the-bargain approach.²¹² The Illinois Supreme Court has stated that “[t]he justification for this rule is that the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons.”²¹³ In fact, the courts in *Peterson*, *Arthur*, and *Wills* primarily relied on this justification.²¹⁴

Applying the benefit-of-the-bargain justification to collateral benefits paid by Medicare and Medicaid would lead to the result that beneficiaries of Medicare and Medicaid would be treated differently. The benefit-of-the-bargain approach justifies allowing a plaintiff to recover in excess of the amount paid by her insurer because, by contracting with that insurer and paying monthly premiums, the plaintiff bargained for that coverage.²¹⁵ In *Arthur*, the situation was identical to that in *Wills*—the insurance company paid a discounted amount as payment in full for the plaintiff’s healthcare—but the plaintiff’s *private insurance company* made the collateral payments pursuant to her insurance contract.²¹⁶ Therefore, this justification supported the *Arthur* court’s decision to allow the plaintiff to recover the full amount charged by the healthcare provider. The court explained that the “plaintiff did not receive a discount from the provider. Rather, plaintiff received the benefit of her bargain with her insurance company—full coverage for incurred medical expenses.”²¹⁷

Similar to the plaintiff in *Arthur*, Medicare recipients for Parts B, C, and D all make some sort of expenditures to obtain coverage.²¹⁸ However, Medicare beneficiaries of Part A and Medicaid beneficiaries in Illinois do not incur expenses or contract to receive medical coverage—it is provided to them free of charge.²¹⁹ Therefore, a true application of the benefit-of-the-bargain approach would require

212. See *Arthur*, 833 N.E.2d at 852; *Wilson*, 546 N.E.2d at 530; 11 ILL. JUR. *Personal Injury & Torts* § 5:63 (2002).

213. *Wilson*, 546 N.E.2d at 530.

214. *Id.*; *Arthur*, 833 N.E.2d at 852; *Wills v. Foster*, 867 N.E.2d 1223, 1225 (Ill. App. Ct. 2007), *rev’d*, 892 N.E.2d 1018 (Ill. 2008).

215. See *Wilson*, 546 N.E.2d at 530; see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 252 (1987) (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.13 (3d ed. 1986)).

216. See *Arthur*, 833 N.E.2d at 853.

217. *Id.*

218. See CENTERS FOR MEDICARE & MEDICAID SERVICES, *supra* note 58.

219. See *id.*; *supra* notes 63–64 and accompanying text.

courts to limit recoveries to the amount paid for all Medicaid beneficiaries, but only for Part A beneficiaries of Medicare.

An additional basic principle of Illinois law supports the appellate decision in *Wills*—a plaintiff is not allowed to recover the cost of services that are rendered to her free of charge.²²⁰ While this distinction may seem minimal, it is significant in light of compensation. When an individual contracts with an insurer and pays premiums in consideration for full medical coverage, that party should receive the benefit of its bargain and get that coverage. Moreover, if the insurance company bargains with the healthcare provider and receives a discount, the plaintiff should still be allowed to recover exactly what she paid her premiums to receive—full coverage. However, when the plaintiff is cared for by a healthcare provider free of charge, and that healthcare provider is required by law to accept any payment from the government as full compensation for the services it renders, allowing the plaintiff to recover more than the amount paid leads to a result in which the plaintiff essentially profits from the judgment while the government incurs the expenses and the healthcare provider is under-compensated.

Although the benefit-of-the-bargain approach, which is the primary justification for the collateral source rule in Illinois, supports the appellate court's holding in *Wills*, the most persuasive and important justifications for holding that the collateral source rule should not apply to Medicare and Medicaid lie in the purpose of compensatory damages and the prohibition against double recovery.

4. *Purpose of Compensatory Damages*

Although deterrence, accountability, potential windfalls, and bargaining benefits all play a role in determining whether the collateral source rule applies to Medicare and Medicaid, it is important to remember that the damages involved only relate to compensation.²²¹ These damages should be limited to the amount required to compensate; they should not be awarded to punish the defendant.²²² However, the collateral source rule by its very nature seems to consist of punitive aspects. If the plaintiff has already received payments that compensate her for her loss, there is no reason to require the defendant to duplicate that compensation unless such a requirement fulfills a policy intended to deter or punish. A tortfeasor guilty of nothing more than negligence should not be required to pay compensatory

220. See *supra* notes 44–53 and accompanying text.

221. See *supra* notes 24–25 and accompanying text.

222. See *supra* notes 24–25 and accompanying text.

damages that do more than compensate the plaintiff for her loss. To require such a payment would violate the very purpose of the damages themselves.²²³ In sum, when a plaintiff's medical expenses are paid by the government at no cost to her, the plaintiff has no loss and, therefore, any amount the defendant must pay to the plaintiff in excess of those expenses is not compensatory.

5. *Prohibition Against Double Recovery*

When the Supreme Court in *Wills* required the defendant to pay the full amount of the medical expenses charged by the healthcare provider, the plaintiff received a double recovery—her expenses were covered once by the government and a second time by the defendant. Illinois law is well established in the nature of double recoveries, and it is clear that the plaintiff's award in this case is wholly in violation of public policy.²²⁴ The policy in Illinois is that a plaintiff should be limited to recovering only once for her loss.²²⁵ This principle seems intuitive, but at a time when insurance plays a role in a majority of cases, the application of this policy to other situations can be complicated.²²⁶

When an injured plaintiff whose expenses are covered entirely by her insurance carrier brings a personal injury action against a negligent third party to recover those expenses, the application of the policy becomes unclear. Ideally, the negligent party would pay the full amount of the expenses and the party that actually incurs the cost would receive that amount from the negligent party.²²⁷ This result could be reached in a couple of ways. The court could simply require the defendant to pay the full amount of the expenses and have the insurance carrier be subrogated to that award to the full extent of the amounts it paid to the provider.²²⁸ Alternatively, the court could refuse to allow the plaintiff to recover the amount paid by the insurance

223. See RESTATEMENT (SECOND) OF TORTS § 903 (1979) (stating that purpose of compensatory damages is to compensate the plaintiff, not punish the wrongdoer).

224. See *Wills v. Foster*, 867 N.E.2d 1223, 1226 (Ill. App. Ct. 2007), *rev'd*, 892 N.E.2d 1018 (Ill. 2008); *Muranyi v. Turn Verein Frisch-Auf*, 719 N.E.2d 366, 369 (Ill. App. Ct. 1999).

225. See *Wills*, 867 N.E.2d at 1226; *Muranyi*, 719 N.E.2d at 369.

226. See ERIC MILLS HOLMES & MARK S. RHODES, APPLEMAN ON INSURANCE § 3.1 (2d ed. 1996) (discussing insurance subrogation rights in general, and how, in the absence of legislative provisions or contractual rights, courts will look to their concern about potential over-compensation when determining whether to allow a legal right to subrogation).

227. See SHAVELL, *supra* note 93, § 10.3.3; HOLMES & RHODES, *supra* note 226, § 3.1 (stating that subrogation is "an important technique for serving the ends of justice by placing the economic responsibility for injuries on the party whose fault caused the loss without also allowing a recovery by the injured person from both an insurer and the tortfeasor that would violate the principle of indemnification").

228. See SHAVELL, *supra* note 93, § 10.3.3; HOLMES & RHODES, *supra* note 226, § 3.1.

company, and provide that company with a right to sue on its own accord to recover for the expenses it incurred.²²⁹ Currently, the general practice of insurance companies is to include subrogation rights in their contracts to ensure that they are compensated for their expenses if negligent third parties cause the beneficiaries' injuries.²³⁰ In the case of Medicare and Medicaid, however, while the government has a subrogation right provided by law, the healthcare provider cannot recover for the difference between the amount paid by the government and the amount it originally charged.²³¹ Neither of the above options reaches the ideal result because the provider does not have a subrogation right for the written off amount. Thus, the question becomes whether the plaintiff should be allowed to recover the full amount charged by the healthcare provider when, in light of the write-off, at least part of the amount becomes profit for the plaintiff.

Some jurisdictions automatically subtract the amounts paid by the insurance company from the injured party's damage award.²³² In fact, the United States is one of few countries in the world that does not, as a general rule, subtract amounts of collateral sources directly from the plaintiff's award.²³³ This practice would likely reduce the amount of personal injury cases because, strangely, the law would require a plaintiff to actually incur some expense to be compensated for its "loss."²³⁴

In light of the five aspects of this issue detailed above, it is apparent that in holding that the collateral source rule does not apply to Medicare and Medicaid, the Illinois Appellate Court came to a conclusion that is more consistent with Illinois law than the alternative approach adopted by the Illinois Supreme Court.²³⁵ If Illinois were a jurisdiction in which the collateral source rule were based on principles of

229. See SHAVELL, *supra* note 93, § 10.3.4.

230. *See id.*

231. *See supra* notes 73–79 and accompanying text.

232. See SHAVELL, *supra* note 93, at 239; Jamie Benidickson, *Canadian Developments in Health Care Liability and Compensation*, in LAW REFORM AND MEDICAL INJURY LITIGATION 23 (Sheila A.M. Mclean ed., 1995) (describing a case from the Supreme Court of Canada in which the court examined the relationship of collateral benefits to recoverable tort damages and reformed the law to require reduction of plaintiffs' damages in light of collateral benefits).

233. See SHAVELL, *supra* note 93, at 239.

234. *See id.*

235. The general policy in Illinois is that a plaintiff can recover only once for its loss. *See* Wills v. Foster, 867 N.E.2d 1223, 1226 (Ill. App. Ct. 2007), *rev'd*, 892 N.E.2d 1018 (Ill. 2008); Muranyi v. Turn Verein Frisch-Auf, 719 N.E.2d 366, 369 (Ill. App. Ct. 1999). The main justification for the collateral source rule in Illinois focuses on the expenditures of the plaintiff to secure the collateral benefits. *See* Arthur v. Catour, 833 N.E.2d 847, 852 (Ill. 2005); Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 530 (Ill. 1989); 11 ILL. JUR. *Personal Injury & Torts* § 5:63 (1996). In Illinois, a plaintiff is precluded from recovering for medical services that were rendered free of

deterrence and accountability, the supreme court would have a stronger argument for concluding that the rule should apply to Medicare and Medicaid.²³⁶ However, the primary justification in Illinois is based on the plaintiff's expenditures and bargains.²³⁷ Because this justification recognizes that the defendant should not benefit from expenditures or contracts the plaintiff has made with third parties, the collateral source rule should not apply to Medicare and Medicaid recipients who receive coverage without incurring expenses or obligations, and without bargaining for their benefits.

The Illinois Supreme Court should have relied on the justifications specifically noted in Illinois, analyzed the relevant aspects associated with the application of this rule to Medicare and Medicaid, and ultimately affirmed the appellate court holding that the plaintiff is limited to recovering the amount paid by the government. Moreover, the most compelling justification for the appellate court's holding is based on the law of compensation. Any amount a defendant is required to pay which recognizes a charge that was written off—and unrecoverable—on account of Medicare or Medicaid is not an amount that compensates the plaintiff.²³⁸ Thus, courts should not allow a plaintiff to recover that amount under a veil of compensation. In fact, if a court were faced with deciding the recoverability of medical charges written off by the providers, for both private insurance and governmental healthcare, the purpose of compensatory damages would mandate that no plaintiff be allowed to recover such an amount if the healthcare provider did not have a subrogation right that would allow it to eventually receive the full value of the services it charged. Without such a subrogation right, the plaintiff profits from laws based on compensation.

V. IMPACT

The most obvious impact *Wills* will have on personal injury cases in Illinois relates to damages. In *Wills*, the appellate court essentially removed the potential for plaintiffs covered by Medicare and Medicaid to recover an amount of compensatory damages in excess of that which was actually paid to the healthcare provider.²³⁹ By reversing

charge. See *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979), *overruled by Wills v. Foster*, 892 N.E.2d 1018 (Ill. 2008).

236. See *Zorogastua*, *supra* note 33, at 476–77.

237. See *Arthur*, 833 N.E.2d at 847.

238. See RESTATEMENT (SECOND) OF TORTS § 901 (1979) (describing the purpose of compensatory damages).

239. *Wills*, 867 N.E.2d at 1223.

the lower court's opinion, the Illinois Supreme Court eliminated this limitation, and now these plaintiffs can receive a value of compensatory damages that "compensates" them for an expense that neither they, nor the government, ever paid.

The impact of *Wills* depends on the size and reach of the governmental programs themselves. The Illinois Medicaid program currently provides assistance to approximately 2.2 million people per year.²⁴⁰ For the fiscal year of 2007, this program provided assistance in excess of eight billion dollars.²⁴¹ According to the Illinois Department of Healthcare and Family Services, the state provided aid for beneficiaries who were serviced by a monthly average of 53,153 healthcare providers.²⁴² In total, the 2006 estimated population of Illinois was approximately 12.8 million.²⁴³ Assuming that these statistics are accurate, that means that approximately sixteen percent of Illinois residents received Medicaid benefits in 2007. Although it is unlikely that the percentage of personal injury plaintiffs covered by Medicaid and Medicare would mirror this number, even if it is relatively close, a large number of cases would be affected by the *Wills* decision.

These simple statistics make the potential effect of *Wills* apparent with respect to damages, but it is also significant to note how this holding may additionally affect personal injury suits in Illinois. *Wills* will have the additional effect of increasing the incentive to bring personal injury suits in the first place. If plaintiffs' compensatory damages are not limited to the amount paid by the government—as *Wills* so holds—injured parties will have additional incentive to bring suit, knowing that they could at least recover some value for the full cost of their medical care. Consider the hypothetical discussed in the introduction, in which a woman is injured in an automobile accident due to a negligent driver, and assume that her hospital bills for that injury total \$100,000.²⁴⁴ Moreover, assume that she is covered by Medicare and Medicaid and that these programs settle the hospital's bill for

240. ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES, ANNUAL REPORT (2007), available at <http://www.hfs.illinois.gov/annualreport> (stating that the program provides aid to 2.2 million people, including 1.3 million children, 509,000 parents, 150,000 seniors, and 240,000 persons with disabilities). In addition to those receiving Medicaid, there are a number of individuals in Illinois who receive Medicare benefits from the federal government. However, because the qualifying criteria of the programs is nearly identical, it is likely that the individuals who receive Medicaid from Illinois are the same ones who receive benefits from Medicare, so any Medicare statistics would overlap and were excluded from this Section.

241. *Id.*

242. *Id.*

243. U.S. Census Bureau, IllinoisQuickFacts, <http://quickfacts.census.gov/qfd/states/17000.html> (last visited Feb. 20, 2009).

244. See *supra* notes 1–2 and accompanying text.

\$50,000. In this situation, if the potential defendant-driver is guilty of nothing more than negligence, the injured woman could bring suit, recover \$100,000 for compensatory damages, have the government recover \$50,000 of that reward pursuant to its subrogation rights, and retain the remaining \$50,000. This remainder is neither compensation for her pain and suffering nor punishment for the defendant's conduct, but rather a compensatory payment for medical expenses that were never paid, expenses for which the hospital will never receive repayment.

Under the Illinois Appellate Court's approach in *Wills*, absent a claim for pain and suffering, emotional distress, lost wages, or punitive damages, the plaintiff in the above situation would recover \$50,000 in medical expenses, all of which would go to the party that actually paid those expenses—the party that needs to be compensated. If this were the situation, what incentive would there be to bring suit?

This hypothetical raises an important question: does the appellate court's approach lead to a fair result? This question highlights several issues discussed in this Note. From a perspective of deterrence, perhaps this result is unfair; the negligent party did not have to pay the full value of the medical care the plaintiff received. From a compensation perspective, however, this result is fair because the plaintiff has no pecuniary loss, and without a loss, there is nothing to compensate. Illinois's public policies can be used to support both sides of this argument—Illinois disfavors double recoveries²⁴⁵ but also aims to deter negligent conduct.²⁴⁶ Thus, the law in Illinois does not provide a decisive answer to this question.

Under the Illinois Supreme Court's holding in *Wills*, the plaintiff in our hypothetical would recover the full \$100,000 for compensatory damages and, thus, would stand to make a considerable profit by recovering damages intended to compensate her for her loss. Is this a result that compensation entails? Illinois should not allow plaintiffs to profit from personal injury suits under a veil of compensation. The *Wills* appellate court correctly responded to these issues, and in determining whether to affirm the appellate court's decision, the Illinois Supreme Court should have analyzed the issues above and reached the same conclusion. The courts of this state should not allow plaintiffs to receive compensatory damages that do more than compensate.²⁴⁷

245. See *Muranyi v. Turn Verein Frisch-Auf*, 719 N.E.2d 366, 369 (Ill. App. Ct. 1999).

246. See *U.S. Can Co. v. NLRB*, 254 F.3d 626, 631 (7th Cir. 2001).

247. See *Wills v. Foster*, 867 N.E.2d 1223, 1228 (Ill. App. Ct. 2007), *rev'd*, 892 N.E.2d 1018 (Ill. 2008).

If the Illinois Supreme Court had affirmed *Wills* on appeal, its holding could have had the effect of reducing the potential recoveries of plaintiffs covered by private insurance, as well. The primary justification for the collateral source rule in Illinois—the benefit-of-the-bargain approach—works to distinguish the application of this rule to governmental healthcare from that of private insurance.²⁴⁸ The general principles of compensation underlying the analysis in this Note, however, would likely lead to an additional conclusion—that plaintiffs covered by private insurance should be limited to recovering the amounts paid by their insurance carriers and should not be able to recover any amounts “written off” by the healthcare provider. But such a result would be consistent with *Wills* only if the healthcare provider contracted away its right to subrogation on the plaintiff’s claim. The trial court in *Wills* provided a procedural approach to its decision that would be flexible enough to account for such potential case-by-case fluctuations.²⁴⁹ The court did not allow the defendant to submit evidence of the Medicare and Medicaid payments during trial, and the court did not decrease the plaintiff’s award until the defendant filed a post-trial motion.²⁵⁰ If the Illinois Supreme Court had affirmed *Wills* and agreed with this procedure, judges would have been allowed to determine, on a case-by-case basis, how the plaintiff’s compensatory damages should be limited, depending on whether any of the healthcare provider’s charges were written off and whether the providers retained subrogation rights therefor. This is the only process that would allow courts to reach the ideal result in each case, a result that follows the principles of compensation.

VI. CONCLUSION

The debate over the collateral source rule and its application to Medicare and Medicaid presents a number of arguments in both law and in policy. Distinguishing Medicare and Medicaid benefits from those derived from private insurance agreements ultimately leads to line drawing that unfairly distinguishes between plaintiffs. In addition, decreasing the amount of damages a defendant should pay as a result of negligent conduct could decrease the incentive to conduct one’s self with due care. However, when a plaintiff is allowed to recover damages in the name of compensation, courts should at least require the plaintiff to show that she has incurred some expense that

248. See *supra* notes 212–220 and accompanying text.

249. *Wills*, 867 N.E.2d at 1224.

250. *Id.* at 1225.

justifies such an award. If a plaintiff has no pecuniary loss and no obligation to pay, there are simply no compensatory damages.

Ultimately, an analysis of the collateral source rule, especially the development of this rule in Illinois, leads to the conclusion that plaintiffs like the one in *Wills* should be limited to recovering no more than the amount the government paid on their behalf. Any deterrence argument opposing *Wills* would have to assume that defendants are aware of the potential costs associated with their conduct, and in this instance, would require an assumption that individuals think about *who* they are negligently injuring before they act. Such an assumption cannot be the backbone of this determination. Moreover, any argument that focuses on favoring the plaintiff over the defendant when confronted with an inevitable windfall would have to assume that giving the plaintiff compensatory damages in the amount needed to compensate her for her loss creates a windfall for the defendant. When considering the nature of compensation and the fact that we are only dealing with those damages, this assumption is misplaced. In addition, although the appellate court used the benefit-of-the-bargain approach to support its decision, such an approach leads to further distinctions that are unnecessary in this case. When considering the nature of compensation and the policy in Illinois of allowing a plaintiff to recover only once for her loss, the necessary determination becomes apparent: The Illinois Supreme Court should have affirmed the appellate court decision and limited compensatory damages for Medicare and Medicaid recipients to the amount actually paid by these governmental entities. To hold otherwise would be to allow compensation when none is due.

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